No. 18791

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STERLING EDWARD NEWCOMB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

JURISDICTIONAL STATEMENT.

Appellant Sterling Edward Newcomb, together with William H. Brining and David A. Harding, were indicted June 31, 1962, for violation of Title 18, United States Code, Section 471 and for violation of Title 18, United States Code, Section 474. On March 15, 1963 the appellant was convicted after a jury trial; appellant was sentenced to 5 years in the custody of the attorney general April 16, 1963.

A timely notice of appeal was filed by appellant on April 19, 1963.

The jurisdiction of the District Court is predicated upon Title 18, United States Code, Section 3231.

This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II.
STATEMENT OF THE CASE.

In June, 1962, appellant Sterling Edward Newcomb, David Anthony Harding, and William Herbert Brining were indicted by the Federal Grand Jury for the Southern District of California; Counts One and Five charged a violation of 18 United States Code, Section 471, counterfeiting Federal Reserve Notes; Counts Three, Four, Six and Seven charged a violation of Title 18, United States Code, Section 474, possession of counterfeit notes, plates and photographing and printing $10 and $20 Federal Reserve Notes. Appellant was not charged in Count Two.

On August 2, 1962, the appellant was arraigned and entered a plea of not guilty. On October 8, 1962, a hearing on the motion to suppress evidence commenced. The hearing lasted two days, and on October 15, 1962, the court made the following findings and order:

> "The Court finds that the arresting officers were justified in relying upon the information furnished by the informer, who, though not known to the officers as a reliable informant at the time the information was given, was subsequently, but before the arrest, corroborated to such extent as to prove reasonably reliable. The informer told the officers that defendants were engaged in counterfeiting at the place of business of the Precision Products Company; that such Company was located at a certain address and purported to manufacture wooden doors; the names and descriptions of each of the defendants; the home addresses of two defendants; a description of the cars of two of the defendants.

"With the exception of the statement that defendants were engaged in counterfeiting, all other information furnished by the informer was checked and found to be accurate. But the officers went further in their investigation and found that at least one of the defendants was working late and unusual hours at this place of business, which was not consistent with the normal requirements of such a business; that at a time when such a business would normally be open for customers, the defendants were carefully keeping the front door of the building locked, unlocking it only to permit one of their number to leave and then immediately relocking it; that one of the defendants was purchasing, in the name of the company, paper stock of a quality and quantity not normally used in the type of business carried on by the Precision Products Company; but which was suitable for counterfeiting; that at least two of the defendants had prior felony convictions and that one of the defendants was a printer.

"Even if the reliability of the informer were in doubt, the tip given by him, together with the subsequent investigation made by the arresting officer prior to the time of the arrest, was sufficient to constitute probable cause of the arrest.

"The Court therefore finds the arrest lawful.

"There having been a lawful arrest, the search which followed was also lawful as incident to the arrest. The breaking down the door and the search of the entire building were justifiable under the circumstances here existing in that having been compelled to show their hand by making the first

> arrest and especially after having seen the furtive glance of one inside the building peering through the drapes, the officers were justified in following up as quickly as possible in order to obtain evidence lest it be destroyed. Having entered, the search of the entire building—which incidentally is a commercial establishment and not a residence—the Court finds to be justifiable and therefor lawful."

On March 15, 1963, after a four day jury trial, the appellant was found guilty. The jury deadlocked when one of the jurors became ill before a verdict could be reached as to the co-defendants, with the exception that as to count two, co-defendant Brining was found not guilty. The court declared a mistrial on all counts as to co-defendant Harding, and the remaining counts as to co-defendant Brining.

III.

STATEMENT OF THE FACTS.

On June 27, 1962, at about 2:00 P.M., Secret Service Agent Kenneth Thompson, met with an unidentified person in a drive-in restaurant. [R. T. 11, 23, 24.][1] This person hereinafter referred to as the informant, told Agent Thompson that David Harding, William Brining, and appellant were counterfeiting $10 bills at Precision Products Company, 3330 South Atlantic Avenue in Long Beach [R. T. 10-11], and that the operation had been in progress for two to three months. He also stated that Precision Products Company was a business engaged in the sale of doors, window sills, plywood and other construction items. [R. T. 11.]

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[1]Reporter's Transcript.

The informant described to Agent Thompson the individuals involved, and the types, years, and colors of the vehicles that they were driving; that appellant was driving a 1961 Corvair Monza, bronze colored, two-door; that Brining was driving a white 1962 Chevrolet pickup truck, without license plates, and that Harding had a blue 1961 Corvan in addition to several other cars. [R. T. 11-12.] He also related that two of the people he described had police records.

The informant stated that Brining was assisting the appellant who was printing the notes; that Brining had a financial interest in the counterfeiting operation. [R. T. 80-81.]

Informed of the meeting by Agent Thompson, Agent Darwin Horn, on June 27, 1962, contacted the Carpenter Paper Company in Long Beach, California, and was advised that Precision Products, under the name of the appellant, had purchased a 1,000 sheets of 8½ by 11, No. 20 Lancaster, 100% rag bond paper on May 11, 1963. [R. T. 138-139.]

At about 5:30 P.M., of the same day, Secret Service Agents took up surveillance at Precision Products and remained there until 1:30 A.M. [R. T. 112.] Agent Thompson observed a night light shining through a curtain which appeared to emanate from a fluorescent table lamp. [R. T. 103.]

At about 9:30 P.M. that evening, Agent Thompson, with three other agents, went to an apartment house at 24 Sixth Place in Long Beach, while two agents remained at the stake out at Precision Products. [R. T. 64.] Agent Thompson observed a Chevrolet pickup truck, without license plates, in the underground garage

at that address. The appellant and Brining were seen moving a large cardboard box from the stair well to the pickup truck and a short time later Brining drove the pickup truck away. Agent Thompson testified that he knew the man was Brining because he was so described earlier by the informant who had also advised that the appellant and Harding had an apartment at the Sixth Place address. [R. T. 14-15.]

Agent Horn, on the same evening, checked the Police records relative to the appellant and Harding. He advised Agent Thompson that appellant had been convicted of robbery and served a five to life sentence; that he had another sentence of six months to 50 years for statutory rape; and that his occupation at the time of arrest by the Long Beach Police Department was lithographer. [R. T. 22.] It was also determined that the records at the Los Angeles County Sheriff's Office showed that Harding had a felony conviction for burglary in 1952. [R. T. 21.]

On June 28, 1962, Agents Thompson, Horn, Weaver and Sheridan took up surveillance at 8:00 A.M., across from Precision Products at 3330 Atlantic Boulevard. Agents Horn and Thompson posed as salesmen in a nearby car agency, and the two other agents occupied a deserted building located about 50 feet from the front door of Precision Products. [R. T. 16-17.] Agent Thompson noted that there was a large sliding door and a smaller door in the rear of the Precision Products Building, and one front door. [R. T. 17.] The windows at the rear were 12 feet above the ground, and the front windows were heavily draped. [R. T. 213.] When the agents arrived, the 1961 Corvair Monza was already in a parking lot at the front of the building, just to the

north of the entrance door. A check of the license number was made with the Department of Motor Vehicles and it was found to be registered to the appellant. Shortly after surveillance began, the appellant was observed exiting from the front door, walking to the Corvair Monza, removing a small box and going back into the building. The door appeared to be locked and had to be unlocked before the appellant could re-enter. [R. T. 19.]

At approximately 9:45 A.M., Brining drove up in the Chevrolet pickup, parked the vehicle and went into Precision Products. The door had to be unlocked before Brining could enter. [R. T. 19-20.]

Precision Products did not appear open for business from 8:00 A.M., to the time of the arrest later that morning. The only persons observed entering the building or leaving the building were the appellant and Brining. [R. T. 20.] About 20 minutes after Brining arrived, the appellant left the building and walked to a mail box. [R. T. 20.] Shortly thereafter, Agent Thompson went to a nearby telephone to call an Assistant United States Attorney to obtain a search warrant. [R. T. 21, 65.] It was agreed that while Agent Thompson was making the call, no action would be taken unless the persons in the building were leaving and not expected to return. [R. T. 21.] Agent Thompson advised the Assistant U. S. Attorney of the plan, and provided him with the known facts in order to obtain a search warrant. [R. T. 65.] He requested that an affidavit for a search warrant be prepared. [R. T. 63.]

While Agent Thompson was conversing with the United States Attorney's office, the appellant was arrested by Agent Sheridan as he entered his vehicle in

front of Precision Products. Appellant had opened the passenger side of the vehicle and placed something inside and then walked around the car, getting in the driver's side. In accordance with a prearranged plan, Agent Sheridan went around on the driver's side and Agent Weaver proceeded up to the passenger's side; Agent Sheridan then placed the appellant under arrest [R. T. 184-185]; and Agent Horn rushed to the rear of the building. [R. T. 169.]

Immediately after the arrest of appellant, Agent Weaver tried the front door—rattling it. He informed Agent Sheridan that the door was locked and the keys to the building were requested from the appellant. [R. T. 188.] Agent Sheridan then shouted, "He is looking out of the window." [R. T. 185.] The person inside the building had pulled the drape aside, looked out, quickly replacing the drapes in a closed position. [R. T. 187.] He could observe the arrest of Newcomb, who at that moment was being placed under arrest while seated behind the wheel of his car. Newcomb's hands were raised to his eye level, as Sheridan handcuffed him. [R. T. 197, 203.]

Agent Weaver then went back to the building and pushed the door open. [R. T. 185.] He entered Precision Products, observed Brining at a desk in the front room and told him he was under arrest. [R. T. 208, 216.] Agent Horn was right behind him having returned from the rear of the building. [R. T. 169.]

The front office was about 10 by 20 feet, and partitioned off except for a door that led into the back portion of the building. [R. T. 174.] Agent Weaver entered the rear area of the building where he observed a camera and a printing press. [R. T. 216, 217.] A

small room was located at the rear, but the door was either stuck or locked. [R. T. 217.] Agent Weaver testified that he believed someone might be in that room [R. T. 218], as he had observed a third person in the vicinity of the building earlier that morning and thought he had entered Precision Products from the rear door. [R. T. 182.] The appellant was brought into the back room and advised the agents that the door sometimes sticks and a knife or screw driver was required to get in. Entry was eventually made to the dark room and the counterfeit currency found there. [R. T. 191.]

The arrests of both the appellant and Brining on June 28, 1962, were made without warrants, and the subsequent search of the premises located at 3330 Atlantic Boulevard was not pursuant to a search warrant. [R. T. 6.]

IV.

ARGUMENT.

1. The Trial Court Properly Held That the Search and Seizure at the Business Address of Precision Products Was Legal and Incidental to a Lawful Arrest and the Property Obtained Was Properly Admitted During the Course of the Trial.

That the premises may be searched incidental to a lawful arrest cannot be questioned.

> *United States v. Rabinowitz,* 339 U. S. 56, 66 (1950);
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> *Harris v. United States,* 331 U. S. 145 (1947);
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> *Agnello v. United States,* 269 U. S. 20, 25 (1925);
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> *Carroll v. United States,* 267 U. S. 132, 158 (1925);
>
> *Abel v. United States,* 258 F. 2d 485 (2nd Cir., 1958), 362 U. S. 217 (1960);
>
> *Marron v. United States,* 8 F. 2d 251, 254 (9th Cir., 1925).

The Supreme Court in *Harris v. United States, supra,* held, at page 150:

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of search warrant. Search and seizure incidental to a lawful arrest is a practice of ancient origin (citation) and has long been an integral part of the law-enforcement procedures of the United States . . ."

In the *Carroll* case, *supra,* the court said:

> "When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." (P. 158)

This Circuit held in *Marron v. United States, supra,* page 254:

> ". . . The right of search extends to the premises in control of the defendant arrested, and authorizes the seizure of that which is evidentiary of the crime." (Citations).

The arrests of appellant and Brining were made without warrants of arrest. [R. T. 6.] It is clear that a secret service officer may arrest without a warrant and conduct a search incidental thereto if he has probable cause within the meaning of the Fourth Amendment, and United States Code, Title 18, Sec. 3056.

> *Draper v. United States,* 358 U. S. 310 (1959);
>
> *Agnello v. United States, supra;*
>
> *Weeks v. United States,* 232 U. S. 383, 392 (1914).

Title 18, *United States Code, Section 3056,* which authorizes Secret Service agents to arrest, reads in pertinent part:

> ". . . the United States Secret Service, Treasury Department, is authorized to . . . detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations and securities of the United States. . . ."

Appellant contends that the court after hearing the evidence and arguments of counsel, erred in denying appellant's motion to suppress the evidence seized. To support this contention appellant urges the Government did not establish probable cause for the arrests. Appellant sets forth two points in his argument: (1) The Government refused to reveal the identity of the informant and (2) That the evidence apart from the communication of the informant, who was not previously known to be reliable, consisted entirely of acts which were not illegal.

Information was received on June 27, 1962 by the Secret Service from an informant that the appellant with two other persons, David Harding and William Brining, were counterfeiting $10 bills at Precision Products Company, 3330 South Atlantic Avenue in Long Beach. [R. T. 10-11.] They were also advised that the appellant was the one who was printing the notes and that Brining had a financial interest in the operation. [R. T. 80-81.]

Although this informant was not previously known to the Secret Service officers [R. T. 28], it is not essential that such person be of known reliability at the time when the information is conveyed; his information is deemed reasonably reliable if there is sufficient corroboration prior to the arrest. In a recent Ninth Circuit case, *Rodgers v. United States,* 267 F. 2d 79 (1959), the court said, at page 88:

> "The reliability of the informant may be established either before the officer's given the information leading to the arrest, or after receiving the information which ultimately leads to the arrest by investigation and corroboration of the in-

formation so received, so long as at the time of the arrest the officer has probable cause to believe his informant."

The following information was provided by the informant and corroborated by investigating officers prior to the arrest of the appellant and Brining at Precision Products on June 28, 1962:

(1) That Appellant Newcomb was driving a '61 Corvair Monza; that Brining was driving a white 1962 Chevrolet pick-up; without license plates, and that Harding had a blue '61 Corvan. [R. T. 12.]

A blue '61 Corvan was observed parked across the street from Precision Products the night of June 27, 1962 and was found to be registered to David Harding. [R. T. 13, 104.] When Secret Service Agents arrived at Precision Products at 8:00 A.M., June 28, 1962, they observed a 1961 Corvair Monza in front of the building and determined it to be registered to the appellant. [R. T. 13.] In the evening of June 27th Agent Thompson had observed Brining, whom he identified from a description provided by the informant, load a box into a 1962 pick-up without license plates and drive away from 24 6th Place in Long Beach. The agent also recognized appellant at that address. [R. T. 14-15.] The physical description of both of these men was provided by the informant. [R. T. 11.] It is to be noted the informant had also advised that Harding and the appellant had an apartment at this address.

(2) That two of the individuals he described had police records. [R. T. 12.]

On the evening of June 27th, Agent Horn checked the record of the appellant at the Long Beach Police

Department and found that he had been convicted of robbery and served a five to life sentence; that he had another sentence of six months to 50 years for statutory rape and that his occupation at the time of the arrest by the Long Beach Police Department was lithographer. Los Angeles County Sheriff's Office records disclosed that Harding had been convicted of a felony for burglary. [R. T. 21-22.]

(3) That the counterfeiting operation at Precision Products had been in operation from two to three months. [R. T. 11.] This information was substantiated by the fact that appellant's purchase of several types of paper on May 11, 1962 from Carpenter Paper Company included 1000 sheets of 8½ x 11 No. 20 Lancaster 100% rag bond paper [R. T. 139], which closely simulates paper used in United States currency. [R. T. 131.] Later the same month, appellant purchased 2,500 sheets of 8½ by 11, 25% rag bond (Ivory) paper. [R. T. 140.] It was the testimony of Agent Horn that many counterfeiters will print their notes on both 100% and 25% rag bond paper. [R. T. 143.]

(4) That of the three, appellant was the one who printed the counterfeit notes. [R. T. 80-81.] Corroborating this is the fact that the appellant is listed in the police records at Long Beach as a lithographer. Agent Thompson testified that a lithographer is a printer. [R. T. 22.]

Observations by the investigating officers not only gave them probable cause to believe the informant at the time of the arrests, but, in addition, when considered with the "tip" alone were sufficient to lead the officers to reasonably conclude that appellant was committing

the crime of counterfeiting U. S. currency. Note the purchase of No. 20 Lancaster 100% rag bond paper. Agent Horn, a special agent for the secret service for eleven years and a participant in over one hundred counterfeiting investigations [R. T. 137, 140], testified that the purchase of 100% rag bond would indicate that further investigation should be made of the purchaser of the paper. [R. T. 140, 175.] Agent Horn reasoned: "Well, this type of paper, of course, is a very fine, good type of paper. Has a body to it that will stand up. Not as good as the paper that our currency is produced on, but it will stand up almost as well as any type of paper that is produced in a similar thickness of our currency. In other words, this—if you are going to counterfeit bills, this would probably be the best type of paper to obtain." [R. T. 140, 141.] Agent Thompson when asked why the purchase of 100% rag bond aroused his interest, testified:

> "Well, this is about as close as you can come to duplicating the genuine paper that U. S. currency is printed on, which is a hundred percent rag content. It is also a very expensive paper, costing much more than, say, even a 25% rag bond, and its just not commonly used." [R. T. 115.]

Thompson also stated that as a matter of general procedure, Secret Service has requested that paper supply houses notify the agency when a person who is not known to them as a reliable printer in a legitimate business makes a purchase of 100% rag paper. [R. T. 115.] A routine check is made of every paper manufacturing house in the Los Angeles area periodically by the Secret Service. [R. T. 31.] As the agents had information that the business of Precision Products

Company was the sale of doors, window sills and other plywood construction items [R. T. 11], it was reasonable that they investigate further.

The reasonableness of the agents' conclusions regarding the purchase of 100% rag bond, was supported by the testimony of William Reymer, sales supervisor for Carpenter Paper Company for eleven years, who testified that 100% rag bond paper is used legitimately for engraved letterheads, bonds and certificates and is ordered only by engravers and stationers because of the considerable cost. [R. T. 122-123.] He also testified in response to an inquiry by appellant, that 100% rag bond would be the closest thing you could find to United States currency.

Possessing the information provided by the informant, police records, and Carpenter Paper Company, the agents took up surveillance at 5:30 P.M., June 27, 1962, at Precision Products, 3330 Atlantic Boulevard in Long Beach. [R. T. 112.] The agents observed a night light shining through a curtain, apparantly emanating from a fluorescent table lamp. [R. T. 103.] They also observed Harding's Corvan parked across the street. Several of the agents, including Agent Thompson, then drove to an address at 24 Sixth Place in Long Beach where the informant had said the appellant and Harding had an apartment. They arrived about 9:30 P.M., drove into the underground garage, and observed the appellant and Brining moving a large cardboard box from the stairwell to the Chevrolet pick-up. After the box was loaded, Brining then drove away and Thompson attempted to follow but was unable to do so.

Surveillance at Precision Products, discontinued at 1.00 A.M. June 28, 1962, began again at 8:00 A.M.

that same morning [R. T. 16, 17.] Unable to look inside the building, as the windows in the rear were twelve feet above the ground and those in the front were heavily draped, the agents kept watch for any suspicious activity that might take place outside. [R. T. 17.] The Corvair Monza belonging to the appellant was already parked in front of Precision Products near the entrance door. Later, appellant was observed leaving the building by the front door, walking to his vehicle where he left a small box. He returned to the building, unlocked the door and re-entered. [R. T. 19.] At about 9:45 A.M., Brining arrived in the Chevrolet pick-up, and entered the building after the door was unlocked from the inside. [R. T. 20.] Agents observed no one else entering or leaving the building with the exception that Agent Weaver saw a third person in the vicinity of the rear of the building. He was unable to determine whether or not this person had entered the building. [R. T. 182.]

Under these circumstances, the conclusion that the appellant and Brining, having closed down Precision Products to the public, were preparing to leave permanently was certainly reasonable. If they had been permitted to leave and thereafter distributed the counterfeit money, then not only would the incriminating evidence be destroyed, but the ever present fear that the counterfeit money would get into circulation would then be an established fact. A later arrest of the appellant and his associate would have been a hollow victory for law inforcement, indeed.

Although facts may be subject to several interpretations this does not prevent, in itself, a conclusion by

investigating officers from being reasonable. As stated in *Rodgers v. United States, supra,* page 88:

> "Even though there might be other reasonable explanations for this attempted concealment still the inference that defendants were engaged in a crime was just as reasonable."

The arrest of Newcomb came first. Appellant had gone to his vehicle, placed something inside, and entered the vehicle on the driver's side. In accordance with a prearranged plan, Agent Sheridan went around on the driver's side and arrested the appellant. [R. T. 184.] Agent Horn rushed to the rear of the building also in accordance with the plan. [R. T. 169.] At this moment, Agent Thompson was calling the U. S. Attorney's office in Los Angeles to provide him with the facts for a search warrant. [R. T. 63.] Prior to his departure, Agent Thompson had agreed with the other agents present, that no arrests were to be made during his absence unless it appeared that either appellant or Brining was leaving. Appellant contends that Agents Weaver and Sheridan in the absence of Thompson, became overzealous and made the arrest and subsequent entry into the building. The contrary is true, as the agents were operating in conformance with a plan agreed upon with Thompson, and in making the arrests followed a procedure already formulated. Appellant urges further that Thompson, in calling the U. S. Attorney, knew that he did not have sufficient basis for arresting the appellant. This assumption is erroneous. Agent Thompson testified that the purpose for contacting the U. S. Attorney, was to provide him with facts necessary to obtain a search warrant. [R. T. 65.] If Thompson had not believed he had suf-

ficient probable cause, certainly he would not request a warrant, nor absent himself from the surveillance at such an unpropitious time.

Whether or not a search warrant was obtained by the officers is not a controlling factor in determining the validity of the search. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search is reasonable.

In 1950, the Supreme Court, ruling on the reasonableness of a search without a warrant, incident to a lawful arrest, in *United States v. Rabinowitz, supra,* said, at page 66:

> ". . . to the extent that *Trupiano v. United States* requires a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, the case is overruled."

Brining could observe the arrest of appellant which occurred directly in front of the window from which he was looking. The appellant's hands, upheld while being handcuffed, were visible to Brining. The fact that Brining realized what was transpiring is evident from his quick movement in closing the drapes. Agent Weaver, having rattled the front door and found it to be locked, was walking toward the Newcomb vehicle to obtain the keys when he saw Brining make his momentary appearance at the front window. [R. T. 187, 188.] Aware that the building had a rear exit, from which Brining might escape, Weaver pushed open the nearby front door. Brining seated at a desk in the front room was immediately placed under arrest. [R. T. 185, 188.]

Agents Weaver and Horn then entered the rear of the Precision Products building, which was partitioned off from the front office area, and observed a printing press and camera. Agent Weaver testified that everything was available to conduct counterfeiting. [R. T. 216-218.] A darkroom was then located at the rear, and eventually opened by Agent Horn was found to contain the counterfeit currency.

The entry of Weaver, by forcing the front door, was reasonable under the circumstances. Brining could have escaped through the rear door, or attempted to destroy the counterfeit money. Weaver also testified he thought perhaps there was a third person in the building whose appearance matched the description of Harding. Well aware of the record of Harding for a felony conviction of burglary, Agent Weaver certainly could not be expected to give any further advance notice of the presence of the officers. In any case, Brining already knew of the officers presence from what he had observed when he looked from the window. Appellee submits that the agents acted as reasonable men under the circumstances and that the arrests were valid.

> "The scope of the word 'reasonable' must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution 'against unreasonable searches and seizures'. Obviously what is 'reasonable' must be judged against a background of the facts known to the particular agent at the time of the arrest. . . ."
>
> *United States v. Vokell,* 251 F. 2d 333 (2d Cir. 1958), at page 336.

In the *Vokell* case, narcotics agents acting under the authority of Title 26, United States Code, 7607(2),

without a warrant of arrest or a search warrant, entered defendant's apartment via the fire escape, through an open window and arrested the defendant and searched the premises.

When Secret Service Agents, acting under the authority of a similar statute, Title 18, United States Code, Section 3056, arrested the appellant and Brining, the informant had been proved to be reliable and this alone was sufficient probable cause. In a similar case, *Rodgers v. United States, supra,* the informant provided information that his wife, together with the appellant's wife, were at the Greyhound Bus Station in San Diego and that appellant's wife had in her possession heroin. The appellant denied this and stated that his wife was in the bus station in Los Angeles. The officers corroborated the statements of the informant, finding the wife where he said she would be. The creditability of the informant was also supported by the fact that he bore 'marks' appearing to be a user of narcotics. Having found the informant reasonably reliable by the time of the arrest, the court at page 88, stated:

> "In determining whether reasonable grounds exist the rules cannot be hard and fast, but must as we have said depend upon all the circumstances. For this reason we cannot accept appellant's argument that an arresting officer must always know in advance that his informant is reliable. Whether the reliability is established before the officer is given the information or thereafter, the effect is the same so long as at the time of the arrest the officer has reasonable grounds to believe his informant. Otherwise it makes little difference when the officer became aware of such grounds."

The court, in determining whether the officers acted reasonably, pointed out:

> "However, in determining whether or not these facts establish probable cause depends only upon whether the inferences which the agents drew from them are reasonable. While the standards imposed to determine probable cause for arrest seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, they also seek to give fair leeway for enforcing the law and the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part but the mistakes must be those of reasonable men acting on facts leading sensibly to their conclusion of probability . . ." (P. 88.)

In the instant case, the agents not only had an informant who had proved to be reliable, they had in their possession additional facts which in themselves made the arrest lawful. The court so found. [R. T. 38, 39.] It is for the trial court, the trier of fact, to determine the weight and credibility of the evidence. Its finding established that the Government had proved sufficient probable cause for the arrest. It is a basic rule of law that the finding must be sustained if there is substantial evidence.

2. The Non-Disclosure of the Identity of the Informant Was Proper.

The privilege not to disclose the identity of an informant belongs to the Government and is based upon a public policy of long standing to protect those persons who come forward to provide information "leading to the detection of crime and the apprehension of the criminal."

> *United States v. Rugendorf,* 316 F. 2d 589 (7th Cir. 1963).

See also:

> *United States v. Li Fat Tong,* 152 F. 2d 650 (2d Cir. 1945);
>
> *Scher v. United States,* 305 U. S. 251 (6th Cir. 1938);
>
> *McInes v. United States,* 62 F. 2d 181 (9th Cir. 1932), cert. den. 288 U. S. 616 (1933).

In *Roviaro v. United States,* 353 U. S. 53, the court held that:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law."

The court, however, found an exception in that "where the disclosure of an informer's identity or the contents of his communication, is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way." The court did state that it believed there was no fixed rule with respect to whether a disclosure is justifiable or not but that the problem calls for balancing the pub-

lic interest and protecting the flow of information against the individual's right to prepare his defense. The *Roviaro* case involved a special employee of the Bureau of Narcotics who was actually involved in the commission of the offense. In fact, he was the only witness who could have disclosed entrapment if there was any. The present case is readily distinguishable from the *Roviaro* case in that the informant was not named in the indictment, and did not participate in the offense. He is therefore not material to the defense of the appellant.

In distinguishing *Roviaro,* the court in *Miller v. United States,* 273 F. 2d 279 (8th Cir. 1959), the court held:

> "We think that the circumstances of this case differ crucially from those cases in which disclosure was required. . . . We are not dealing with one who was an active participant in the crime . . . and who would have been able to testify directly about the very transaction that constitutes the crime. . . ."

There, the informant supplied information to officers that an automobile of a particular make, model and year would be coming from a location having a reputation for moonshine activity and that it would be driven by the defendant or another white male carrying untaxed whiskey. It is to be noted that the court also found probable cause on the basis of the information provided by the informant.

The determination of the validity of an arrest was held to be essential to the proper disposition of a case, in *Costello v. United States,* 298 F. 2d 99 (9th

Cir. 1962). The court cites in support of this holding, *Wilson v. United States,* 59 F. 2d 390 (3d Cir. 1932), which cited with approval *Roviaro v. United States, supra.* The Costello court, in requiring the disclosure of the name of the informant, stated that when the customary check for the magistrate yields to the necessity of quick action,

> "the courts then exercise a post-arrest check on the actual existence of that probable cause. This latter check would not be effective if it looked no further than the uncorroborated tip of anonymous informant. . . . It is enough to observe that in this situation a reasonable opportunity for the appellant to challenge the reliability of an informant must be permitted or no real judicial check would ever take place."

The court refused to compel the disclosure of the name of the informant.

In *United States v. Whiting,* 311 F. 2d 191 (4th Cir. 1962), the court stated that the *Roviaro* case did not apply where the attorney for the defendant wanted the names of the informers "in support of the effort to invalidate the search warrant and not to help the defendant's presentation of their case."

The *Roviaro* case was considered further in *Bruner v. United States,* 293 F. 2d 621 (5th Cir. 1961) where the court held, at page 62:

> "On the question as to whether the Government should have been required to disclose the identity of the informer, it seems now to be settled that such disclosure cannot be required unless it is relevant and helpful to the defense of the accused or essential to a fair determination of the cause. . . . Nothing in the record before us shows any need for requiring a disclosure to be made."

In *Costello,* the court, concerned primarily with the question of probable cause, required the disclosure of the informant's name as there was no corroboration of the information which he provided. In the case before us, however, revealing the informant, and requiring that he take the stand and subject himself to defense counsel examination, is not necessary to permit an adequate check on the police officers making the arrest. The facts which provide sufficient corroboration to make the informant reliable at the time of the arrest, were the result of personal observations of the investigating officers and, therefore, the personal credibility of the informant, who was neither known to be either reliable or unreliable at the time he gave the information, is not in issue and would add nothing material to the proper disposition of the case.

V.

CONCLUSION.

It is respectfully submitted that the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Robert H. Filsinger